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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF SOUTH CAROLINA,
GREENVILLE DIVISION

T. B. HOLLIDAY, ET AL.,

Appellants,

vs.

GOVERNOR OF STATE OF SOUTH CAROLINA, ATTORNEY GENERAL OF STATE OF SOUTH CAROLINA, R. H. BEARDEN, SHERIFF OF GREENVILLE COUNTY, SOUTH CAROLINA, AND ALL LAW ENFORCEMENT OFFICERS OF THE STATE OF SOUTH CAROLINA,

Appellees

STATEMENT AS TO JURISDICTION ON APPEAL

Pursuant to the provisions of Rule 12 of the Supreme Court of the United States, 1939, as amended, the above named plaintiffs and appellants file this, their separate statement, particularly disclosing the basis upon which it is contended the Supreme Court of the United States has jurisdiction to review the Decree and Order of dismissal appealed from herein, as follows:

A

Statutory Provisions Sustaining Jurisdiction

The statutory provisions believed to sustain the appellate jurisdiction of the Supreme Court are Sections 238 and

266 of the Judicial Code as Amended (28 U. S. C. A. Sections 345 and 380).

B

The Statute of the State, the Validity of Which Is Involved

The statute of the State of South Carolina, the validity of which is involved, is Section 1301 of the Code of Laws of South Carolina for 1942, which reads as follows:

"SECTION 1301 CODE OF LAWS OF SOUTH CAROLINA 1942"

"Slot machines unlawful, except those giving certain returns.—It shall be unlawful for any person to keep on his premises or operate or permit to be kept on his premises or operated within this State any slot machine of whatever name or kind, except automatic weighing, measuring, musical and vending machines which are so constructed as to give a certain uniform and fair return value for each coin deposited therein, and in which there is no element of chance. Any person who shall violate this section shall be subject to a fine of not more than one hundred dollars, or imprisonment upon the public works of not more than thirty days."

"SECTION 1301-1. UNLAWFUL TO KEEP OR OPERATE VENDING OR SLOT MACHINES, PUNCH BOARD, ETC. PERTAINING TO GAME OF CHANCE.

(1) *Certain machines excepted.*—It shall be unlawful for any person, firm or corporation to keep on his, her or its premises, or operate or permit to be kept on his, her or its premises, or operated within this State, any vending or slot machine, punch boards, pull boards, or other device pertaining to games of chance of whatever name or kind, except automatic weighing, measuring, musical and vending machines which are so constructed as to give a certain uni-

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form and fair return in value for each coin deposited therein, and in which there is no element of chance. Any person, firm or corporation violating this section shall be subject to a fine of not more than five hundred ($500.00) dollars, or imprisonment upon the public works of the county wherein the offense is committed or in the State Penitentiary for a period of not more than one (1) year or both fine and imprisonment, in the discretion of the Court: *provided,* that this section is also intended to prohibit all vending, slot machines, punch boards, pull boards, or other devices pertaining to games of chance, that display different pictures, words or symbols, at different plays, or different numbers, whether in words or figures, or which deposit tokens or coins at irregular intervals, or in varying numbers to the player or in the machine."

"(2) *Seize said machines—magistrates to order destruction.*—Any vending or slot machine, punch board, pull board, or other device pertaining to games of chance, prohibited by this section shall be seized by any officer of the law and at once taken before any magistrate of the county in which such machine is seized, who shall immediately examine same, and if he is satisfied that such vending or slot machine is in violation of this section or any other law of this State, he shall direct that said machine be immediately destroyed."

"(3) *Destruction of machines already seized.*—All vending or slot machines, punch boards, pull boards, or other devices pertaining to games of chance, which have heretofore been seized under any law and not destroyed shall be immediately disposed of as provided herein, for machines seized under the provisions of this section."

"(4) *Supplemental to section 1301—destruction of machines already seized.*—This section is intended to be in

addition to and supplemental to section 1301, and all vending or slot machines, punch boards, pull boards, or other devices pertaining to games of chance, which have heretofore been seized under any law and not destroyed shall be immediately disposed of as provided for in subsection 2 of this section, for machines seized under the provisions of this section."

The cases of the South Carolina Supreme Court holding that coin operated pin table machines with free play features are gambling devices per se, and therefore fall within the prohibition of the aforesaid statute are as follows:

Alexander v. *Martin*, 192 S. C. 176;
Alexander v. *Hunnicutt*, 196 S. C. 364;
State v. *Appley*, 207 S. C. 284,
Ingram v. *Bearden*, (Opinion Number 16069, filed April 26th, 1948), Westbrook's Advance Sheets, May 1st, 1948.

C

Date of Decree and Date of Application for Appeal

The date of the Decree and Order sought to be reviewed is the 20th day of July, 1948, and the date upon which application for appeal is presented is the 22nd day of July, 1948.

D

The Nature of the Case and Rulings of the Court Bringing the Case Within the Jurisdictional Provisions Relied On

This action is one wherein the plaintiffs seek to enjoin the enforcement of Section 1301 of the Code of Laws of South Carolina for 1942 as construed by the South Carolina Supreme Court on the ground that it is an unlawful interference with the business of operating and otherwise dealing

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in providing amusement through the media of coin operated pin tables with free play feature, and that such interference is in violation of Section 1, Article 14, (14th Amendment) of the United States Constitution.

The proceedings herein put in issue the validity of the aforesaid statute and decisions of the South Carolina Supreme Court and raise the substantial question as to whether the enforcement of the aforesaid statute as construed by the South Carolina Supreme Court, in reference to plaintiff's business, which he claims is inherently innocent, deprive the plaintiff of his property without due process of law and denies to him the equal protection of the law under Section 1, Article 14, (14th Amendment) of the United States Constitution. Application to a Court of three Judges for an interlocutory injunction under Judicial Code, Section 266, was denied. On the hearing for the interlocutory injunction it was agreed that the case be submitted for final Decree upon the merits at which time the application for permanent injunction was also denied and the complaint dismissed on the merits. The plaintiff contends that the Rulings, Order and Decree of the specially constituted District Court is erroneous for the reason that the court failed to hold that the aforesaid statute as construed by the South Carolina Supreme Court declaring the pin tables involved in the instant case gambling devices per se has no basis, is arbitrary and denies to the plaintiff his fundamental rights under the equal protection of law clause and due process of law clause of Section 1, Article 14, (14th Amendment) of the United States Constitution.

Appended hereto is a copy of the Opinion and Order delivered upon the rendering of the Decree sought to be reviewed.

E

Cases Believed to Sustain Jurisdiction

The following decisions of this Court are believed to sustain the jurisdiction of this appeal:

Interstate Busses Corporation v. *Bladgett,* 276 U. S. 245;

Clark v. *Poor,* 274 U. S. 554;

Smith v. *Wilson,* 273 U. S. 388, 391;

Moore v. *Fidelity & Deposit Co.,* 272 U. S. 317, 320;

Ex parte Buder, 271 U. S. 461, 464, 465;

Pacific Telephone & Telegraph Co. v. *Kuykendall,* 265 U. S. 196, 206;

Shaffer v. *Carter,* 252 U. S. 37, 44

We respectfully submit that the Supreme Court of the United States has jurisdiction of this appeal by virtue of Section 238 and 266 of the Judicial Code as Amended (28 U. S. C. A. Section 345 and 380).

HENRY H. EDENS,
HENRY HAMMER,
Counsel for Appellants.

CHANDLER, BELK & CHANDLER,
Of Counsel.

APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF SOUTH CAROLINA, GREENVILLE DIVISION.

Opinion C. A. 874

T. B. HOLLIDAY, *Plaintiff*,

v.

GOVERNOR OF STATE OF SOUTH CAROLINA, ATTORNEY GENERAL OF STATE OF SOUTH CAROLINA, R. H. BEARDEN, Sheriff of Greenville County, South Carolina, and ALL LAW ENFORCEMENT OFFICERS OF THE STATE OF SOUTH CAROLINA, *Defendants*

Before Parker, Circuit Judge; Wyche and Hutcheson, District Judges

WYCHE, *District Judge:*

The plaintiff in this suit seeks to enjoin the enforcement of Sections 1301, 1301-1, 1301-1(2), Code of Laws of South Carolina, 1942,[1] and Act No. 284 of the Acts of 1947 of the

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[1] § 1301. SLOT MACHINES UNLAWFUL, EXCEPT THOSE GIVING CERTAIN RETURNS.—It shall be unlawful for any person to keep on his premises or operate or permit to be kept on his premises or operated within this State, any slot machine of whatever name or kind, except automatic weighing, measuring, musical and vending machines which are so constructed as to give a certain uniform and fair return value for each coin deposited therein, and in which there is no element of chance. Any person who shall violate this section shall be subject to a fine of not more than one hundred dollars, or imprisonment upon the public works of the county wherein the offense is committed for a period of not more than thirty days.

§ 1301-1. UNLAWFUL TO KEEP OR OPERATE VENDING OR SLOT MACHINES, PUNCH BOARD, ETC., PERTAINING TO GAME OF CHANCE.

(1) CERTAIN MACHINES EXCEPTED.—It shall be unlawful for any person, firm, or corporation to keep on his, her, or its premises, or operate or permit to be kept on his, her, or its premises, or operated within this State, any vending or slot machine, punch boards, pull boards, or other devices pertaining to games of chance of whatever name or kind, except automatic weighing, measuring, musical and vending machines which are so constructed as to give a certain uniform and fair return in value for each coin

General Assembly of South Carolina,[2] upon the ground that such Acts are in violation of Section 1, Article 14, (Fourteenth Amendment) of the United States Constitution.

These Acts, as construed by the South Carolina Supreme Court, declare "coin operated non-payout pin tables with free play feature" to be gambling machines per se, and as such subject to seizure and destruction.[3]

An interlocutory injunction was sought and a Court of Three Judges was constituted, pursuant to Section 266 of the Judicial Code, 28 USCA 380.

By consent, a hearing was held at Asheville, North Carolina, on June 23, 1948, at which time it was agreed by counsel for all parties that the case be submitted for a final decree upon the merits.

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deposited therein, and in which there is no element of chance. Any person, firm, or corporation violating this section shall be subject to a fine of not more than five hundred ($500.00) dollars, or imprisonment upon the public works of the county wherein the offense is committed or in the State penitentiary for a period of not more than one (1) year or both fine and imprisonment, in the discretion of the court: *provided*, that this section is also intended to prohibit all vending, slot machines, punch boards, pull boards, or other devices pertaining to games of chance, that display different pictures, words or symbols, at different plays, or different numbers, whether in words or figures, or which deposit tokens or coins at irregular intervals, or in varying numbers to the player or in the machine.

(2) SEIZE SAID MACHINES—MAGISTRATES TO ORDER DESTRUCTION.—Any vending or slot machine, punch board, pull board, or other device pertaining to games of chance, prohibited by this section shall be seized by any officer of the law and at once taken before any magistrate of the county in which such machine is seized, who shall immediately examine same, and if he is satisfied that such vending or slot machine is in violation of this section or any other law of this State, he shall direct that said machine be immediately destroyed.

[3] *Ingram et al.* v. *Bearden* (filed April 26, 1948), Westbrook's Advanced Sheets, May 1, 1948.

[2] Section 1. (a) That every person, firm or corporation owning, operating or maintaining any place of business, or other place, wherein or in connection with which, is operated or located any machine for the playing of music, games or amusements, operated by a slot wherein is deposited any coin or thing of value or any machine in which is kept any article to be purchased by depositing any coin or thing of value, *or any coin operated non-payout Pin Tables with free play feature shall apply for and procure from the South Carolina Tax Commission a license for the privilege of operating any and every such machine and shall pay for such license a Tax of Fifteen ($15.00) dollars per machine;* • • •

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The basis for the jurisdiction of this Court is the allegations of plaintiff that he is the owner and conditional vendor of legal coin operated amusement machines, (known as "coin operated non-payment pin tables with free play feature") without any gambling feature, located at various places in the State of South Carolina; that the machines are of a value in excess of $3000, and that the interest of the plaintiff as owner and conditional vendor of the machines is in excess of the sum of $3000; that he has been informed that the defendants intend to seize and destroy all of the machines in which the plaintiff has an interest, either as owner or as conditional vendor, which are located at various places within the jurisdiction of this court; that the machines are not legally subject to seizure and destruction by the defendants; that the amusement machines are not games of chance within the provisions of the foregoing statutes of the State of South Carolina; that the statutes are unconstitutional, null and void, and in violation of the Fourteenth Amendment of the United States Constitution, because the statutes treat, embrace, regard and include the said coin operated amusement machines of the plaintiff as gambling devices per se, and subject them to seizure and destruction as gambling devices per se; although they are inherently innocent, and are not gambling devices per se; that their intended seizure and destruction, or any seizure and destruction of them, are and would be, in violation of plaintiff's constitutional rights; that unless defendants are enjoined, as prayed for, plaintiff will suffer immediate and irreparable injury, and that plaintiff is without an adequate remedy at law.

A temporary restraining order enjoining and restraining the defendants, their agents, or servants, from interfering with, seizing or destroying or threatening to seize or destroy any of the said machines owned by the plaintiff, or in which the plaintiff had an interest, was granted for ten days, without notice, under the provisions of 28 USCA 381, and also, Rule 65, Rules of Civil Procedure. Subsequently, the temporary restraining order was continued, by consent of the parties, until such time as the issue may be determined on the merits, or until the further order of the Court.

At the hearing plaintiff offered testimony to describe the machines and had one of them operated in open court as part of the evidence in the case. The coin operated non-payout Pin Tables with free play feature is about five feet long, three and one-half feet high, and is supported by four table legs. The playing field, containing lights and electrical contacts, is enclosed in a cabinet covered with glass, and is about forty-two inches long, and twenty-one inches wide. At the rear of the table is the back-board about twenty-one inches high; it stands with the legs about five and one-half feet high. The illuminated portion of the back-board is two feet by two feet. To put the machine in operation by a player a coin is placed in a slot which releases a certain number of steel balls to the player. To play, the ball is projected onto the playing field by a plunger. "With different combinations, you hit certain numbers. With different (other) combinations, you don't hit certain numbers. Because in hitting certain numbers, you might detract from your score or fix it in such a way that you won't be able to build up a score as high as possible. * * * On this machine, you have numbers 1 through 6 inclusive. By hitting 1, 2, 3, and 4, you hit a light which is a double feature, which doubles the score placed on the bonus. The bonus is graduated by yellow and purple lights, distributed on the playing field. Every time you hit one of these playing lights (Illustrating), you advance your bonus one time. In order to take that bonus off, the ball has to drop through this playing field here. (Indicating). When you hit 1, 2, 3, 4, you light up a double-feature bonus, one hundred thousand, which enables you to collect two hundred thousand on your bonus. When you hit your 5 and 6, you enable yourself to collect triple your ordinary bonus on the single." Some players make consistently higher scores than others. "If a person walks in a place now and then and puts a nickel in the machine, he has no idea as to how the machine reacts when the ball hits a bumper. He can study the combinations, know where the ball is going to hit, know where he wants to put the ball and know how to put it there. Some person might put a nickel in and the ball rolls in and you don't get anything. You have to know how to operate the machine in order to get a score. * * * The skill comes in when you want to hit

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a certain light, you have to know how hard to pull your plunger and how far to let your ball go to hit that light. If you don't know, naturally, you will not hit that light." After the ball has been released by the plunger and when the ball starts down the playing field the player can guide it. "There is such a thing as shaking a pin ball machine. If you stand and let the machine idle it will strike a bumper with less force and rebound with less force than if you push the machine. * * * It can be used as a gambling device. * * * When you play your ball on your playing field, you strike certain lights. If you will watch these columns, they advance. (Indicating and illustrating). When you go through this slot, you get a single bonus. You light 1, 2, 3, 4, for a double bonus; light 5 and 6, you will have a triple bonus, which will give you three hundred thousand." "Flippers" enable a player to utilize visual timing or physical timing to influence the course of the ball. "If you know how to operate the machine, you can catch the ball (with "flippers"), throw it up in the playing field and use it again. You have buttons on the sides. * * * If you strike one bumper and want to hit a certain number, if you don't shake the machine, it will glance, but if you shake the machine, it will go up and give you the object which you want to obtain." In demonstrating the machine the witness won eleven free games, which gave him fifty-five free balls to play without putting up any more money. The score of a player is recorded on the back-board. The player has no way of knowing in advance what his score will be, the score being unpredictable, and being determined solely by the particular metallic post or pin with which the ball comes in contact. Plaintiff also offered in evidence slot machines, pull boards, punch boards, and other gambling devices, for the purpose of comparison with the machines sold by the plaintiff.

It is plaintiff's contention that his machines are not gambling devices, *per se*, and that for this reason the General Assembly of South Carolina has no right to declare them to be such.

The Supreme Court of South Carolina in *Alexander* v. *Martin, Sheriff*, 192 S. C., 176, 6 S.E. 2d, 20; in *Alexander* v. *Hunnicutt, Sheriff, et al.*, 196 S. C., 364, 13 S.E. 2d, 630;

and in *The State* v. *Appley*, 207 S. C., 284, 35 S.E. 2d, 835, decided that coin operated non-payout pin tables with free play feature were gambling machines per se under the statute, and were subject to seizure and destruction as such. In *Ingram, et al.* v. *Bearden* (filed April 26, 1948) the State Supreme Court again held that coin operated non-payout pin tables with free play feature were gambling devices per se, subject to seizure and destruction, and that the licensing Act of 1947, did not render such machines, or their operation, legal.

In *Alexander* v. *Martin, Sheriff*, 192 S. C., 176, 6 S.E. 2d, 20, the South Carolina Supreme Court gave its reasons for declaring coin operated non-payout pin tables with free play feature gambling devices per se in the following words: "While it is true that the player receives the same number of balls for each coin deposited, he may or may not make the same score for each coin's worth of balls played. This in itself is an element of contingency, dependent upon chance, and would make of the machine an unlawful device, inasmuch as the law above quoted condemns all vending or slot machines or other devices pertaining to games of chance, which display different pictures, words or symbols at different plays, or different numbers, whether in words or figures, or which deposit tokens or coins at irregular intervals, or in varying numbers to the player or in the machine.

"In addition to this, contingent upon the score recorded for a player, free games are awarded. Therefore, it is clear that the lure and inducement to the player to operate the machine is the chance of occasionally being allowed to play a game or games without additional cost. This feature, we think, clearly pertains to a game of chance. And this is true, whether the machine is played for amusement or for other returns, such as money.

"Amusement is recognized by the Courts as a thing of value, and where the amount of amusement given by the player of the machine is determined by chance or hazard, such machine is held to be a gambling device."

The decisions of the courts of several other states are in full accord with the South Carolina decisions. *Approximately Fifty-Nine Gambling Devices* v. *People ex rel.*,

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Burke, 130 P. 2d, 920, 922, 110 Colo. 82; *People* v. *Bitter*, 32 N.Y.S. 2d, 176, 179; *People* v. *One Pinball Machine*, 44 N.E. 2d, 950, 953, 316 Ill. App. 161; *Oatman* v. *Davidson*, 16 N.W. 2d, 665, 666, 310 Mich. 57. The decisions seem to be unanimous in holding that the prohibition of pin table machines with free play feature is a valid exercise of the police power and constitutes no violation of the Fourteenth Amendment. *Woodward* v. *City of Lithonia*, 11 S.E. 2d, 476; 191 Ga. 234; *Eccles* v. *Stone* 183 So., 628, 134 Fla., 113; *Calcutt* v. *McGeachy*, 195 S.E., 49, 213 N. C., 1; *Sowma* v. *Parker*, 112 Vermont, 241, 22 A. 2d, 513; *Phillips* v. *City of Atlanta*, 57 F. Supp. 588, affirmed, 145 F. 2d, 470.

The Supreme Court of Georgia (*Woodward* v. *City of Lithonia*, 11 S. E. 2d, 476, 191 Ga. 234) held that an ordinance of the town of Lithonia, Georgia, prohibiting pin table machines was a valid exercise of police power and did not violate the Fourteenth Amendment.

The Supreme Court of Florida in *Eccles* v. *Stone*, 183 So. 628, 134 Fla., 113, in holding that non-payout pin table machines were gambling machines per se, and that the statute declaring them so, did not violate the Fourteenth Amendment, but that such a statute was a valid exercise of the police power, said: "It is also a matter of common knowledge that pursuant to the passage of that Act (the 1937 Florida Act which prohibited the operation of the "one-armed bandit" type slot machine) the popular slot machine with its set of pictured wheels, its alluring jackpot and its pull lever, generally known as the one-armed bandit, faded away from the public places and immediately in the places where they had stood were set up the mechanical horse races, marble pin games and other coin-operated mechanical devices, adapted and fit for fast, easy gambling and it is a matter of common knowledge, of which we cannot plead ignorance, that these machines are generally used as gambling devices and that the gambling element is the principal lure which causes them to be played by the public."

North Carolina has a similar statute and the Supreme Court of that State in *Calcutt* v. *McGeachy*, 195 S. E., 49, 213 N. C. 1, decided that a statute prohibiting the manufacture, sale and possession of gambling apparatus, and defining prohibited devices so as to include pin table machines,

was a reasonable regulation within the police power of the State of North Carolina and did not violate the Fourteenth Amendment. In this case it was said: "In the instant case, when considered in the light of a state policy of suppressing and prohibiting gambling, there is a reasonable relation between a coin-operated slot machine in the playing of which the operator may make varying scores or tallies upon the outcome of which wagers may be made, and those so operated which may give a return of something of value which is unknown to, or unpredictable by, the operator. The element of chance is present. This justifies sustaining the statute as a reasonable regulation, and within the police power vested in the Legislature."

The Supreme Court of Vermont in the case *Sowma* v. *Parker*, 112 Vermont 241, 22 Atl. 2d, 513, in deciding that an Act prohibiting pin ball machines was constitutional, said: "That Act No. 190 of the Acts of 1941 was also a police measure cannot be doubted as it is apparent that it was passed in order to promote the morale and general welfare of the citizens of the State for it had become a matter of common knowledge that the results of the playing of such machines were iniquitous and detrimental, both financially and otherwise, to the players and often to those dependent upon them."

In the case of *Phillips* v. *City of Atlanta*, 57 F. Supp. 588, the United States District Court for the Northern District of Georgia, declared that an ordinance of the City of Atlanta prohibiting pin ball machines was a valid exercise of the police power against an attack on the ordinance on the grounds that it violated the Fourteenth Amendment. The Circuit Court of Appeals for the Fifth Circuit affirmed the District Court. *Phillips* v. *City of Atlanta*, 145 F. 2d, 470.

It is well established that statutes having for their object the suppression of gambling are within the scope of the police power vested in the States. 12 *C. J.* 918.

In the case of *Murphy* v. *California*, 225 U. S. 623, 32 S. Ct. 697, the Supreme Court declared that: "The Fourteenth Amendment protects the citizen in his right to engage in any lawful business, but it does not prevent legislation intended to regulate useful occupations which, because of

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their nature or location, may prove injurious or offensive to the public. And neither does it prevent a municipality from prohibiting any business which is inherently vicious and harmful. But between the useful business which may be regulated and the vicious business which can be prohibited lie many non-useful occupations, which may, or may not be harmful to the public, according to local conditions, or the manner in which they are conducted. • • • 'A calling may not in itself be immoral, and yet the tendency of what is generally or ordinarily or often done in pursuing that calling may be towards that which is admittedly immoral or pernicious.' ".

Plaintiff relies strongly upon the case of *Washington Coin Mach. Ass'n* v. *Callahan*, 142 F. 2d 97. In this case the United States Court of Appeals of the District of Columbia was construing the penal statutes of the District of Columbia, which make it unlawful to set up, or keep in the District any kind of gambling device designed for the purpose of playing any game of chance for *money or property.* In that case it was said: "Enough has been said to indicate that the issue below and here is limited to the question whether the award of a free play or a second try, in the circumstances we have described, makes such a device a gaming table and its use a game of chance 'for money or property' • • • Unquestionably, the purpose of Congress in the enactment of the local law was to make criminal the use of all contrivances by which money or property is bet or wagered or risked on the chance of some material reward."

It will be seen that the question in that case was: Was the pin table machine a gaming table and its use a game of chance for "money or property." The South Carolina Statute is much broader. While the opinion of Chief Justice Croner, by way of *obiter dictum*, and the authorities cited, tend to support plaintiff's contention that a pinball machine is not a gambling device per se, the question there decided was whether or not the machine was used as a game of chance for "money or property." That question is not involved here. We must place upon the South Carolina Statute the meaning given it by the Supreme Court of that

State; and the only question that remains is whether, as so construed, the Statute violates the Federal Constitution. In the District of Columbia case, the only question was whether the Statute covered the pinball machines in question in that case.

It is the public policy of the State of South Carolina to suppress gambling. Gambling in all forms is illegal in South Carolina. A negotiable instrument executed in payment of a gambling debt is "utterly void, frustrate, and of none effect," under the Statute law of South Carolina (Section 6311, Code of Laws of South Carolina, 1942) and the Legislature of South Carolina in its discretion, in carrying out this public policy, determined in 1931 that any coin operated machine which does not give a uniform and fair return in value for each coin deposited, and in which there is any element of chance, was illegal as being a gambling device, and as tending to promote and encourage the gambling instinct.

Under the facts in this case and under the authorities herein cited, we must conclude that a coin operated non-payment pin table with free play feature is a gambling machine. The owners of these machines require a price to be paid for operating them. While there may be some skill in operating the machines, as demonstrated to the Court at the hearing, the score the player receives varies with each game and is the result of chance. Depending upon that score the player either receives or does not receive a prize in the form of additional free games and additional amusement. These machines have all the elements of a gambling machine, namely, consideration, chance and prize. They do not give a certain uniform return value for each coin deposited. The varying scores are conducive to side wagers. The owner could easily agree to pay off the winner with money instead of playing balls.

The business of the plaintiff in selling and operating pin table machines is not recognized as a necessary or useful business. It is potential of evil. Playing his machines may be fraught with danger to the morals of those who play. These machines are usually located in resorts, public places, hotels, and drug stores, where all who can pay the price are at liberty to come and play. They may have a tendency to

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collect idle people, school boys and college boys together, to detain business people from their business, and wage earners from their work. The owners and operators of such machines are interested in stimulating play and in having as full attendance each day as possible, from which temptations beyond mere amusement are likely to result. The General Assembly of South Carolina, Under its police power, had the right to declare such machines gambling machines per se, and as such illegal in the State of South Carolina. It had the right by such legislation to guard the youth of the State, school boys and college students against the insidious temptations and protect them from the evil and corrupting influences that may be clustered around and emanate from coin operated pin ball machines, an instrumentality that adds nothing to the general welfare, affords no employment to the unemployed, produces nothing, where nothing is bought and carried home and used, and is merely a civic parasite.

For the reasons herein stated we must conclude that the statute in this case is clearly a valid exercise of the police power of the State of South Carolina, and constitutes no attempt on part of the State to deprive plaintiff of his property without due process of law.

The findings and conclusions in this Opinion will stand as the Findings of Fact and Conclusions of Law in this cause under 52(a) of the Rules of Civil Procedure. An Order so providing will be included in the final decree for the defendants which will deny the injunction sought in this suit.

Accordingly, an Order denying the injunction and dismissing the action will be filed herewith.

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF SOUTH CAROLINA, GREENVILLE DIVISION.

Order C. A. 874

T. B. HOLLIDAY, *Plaintiff*,

v.

GOVERNOR OF STATE OF SOUTH CAROLINA, ATTORNEY GENERAL OF STATE OF SOUTH CAROLINA, R. H. BEARDEN, Sheriff of Greenville County, South Carolina, and ALL LAW ENFORCEMENT OFFICERS OF THE STATE OF SOUTH CAROLINA, *Defendants*

Upon the pleadings in this case and upon the evidence offered at the hearing in this Court,

It Is Ordered and Adjudged this 20th day of July, 1948, for the reasons set forth in the Opinion of the Court to be filed herewith, that the injunction applied for be denied, and that the bill of complaint in this case be and the same is hereby dismissed, and that judgment be duly entered for the defendants.

In the event of an appeal from the judgment to be entered in this case, It Is Ordered that the defendants, their agents and servants, be and they are hereby restrained and enjoined pending the appeal from seizing and/or destroying any coin operated non-payout pin tables with free play feature owned by the plaintiff and others who have intervened in this cause as plaintiffs, either as owner or conditional vendor of the said machines.

In the event of an appeal from said judgment for the defendants It Is Further Ordered, that the temporary restraining order heretofore entered and agreed to by the parties, be and the same is hereby extended for a period of ten days from the date of this Order, in order to permit the said plaintiffs to apply to the Supreme Court for further injunctive relief pending the appeal, if they so desire.

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It Is Further Ordered that the findings and conclusions in the Opinion filed herewith, will stand as the Findings of Fact and Conclusions of Law in this cause, in compliance with Rule 52(a) of the Rules of Civil Procedure.

(S.) JOHN J. PARKER,
United States Circuit Judge.
(S.) C. C. WYCHE,
United States District Judge.
(S.) STERLING HUTCHESON,
United States District Judge.

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AUG 28 1948
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1948

No. 249

T. B. HOLLIDAY ET AL., APPELLANTS,

versus

GOVERNOR OF STATE OF SOUTH CAROLINA, ATTORNEY GENERAL OF STATE OF SOUTH CAROLINA, R. H. BEARDEN, SHERIFF OF GREENVILLE COUNTY, SOUTH CAROLINA, AND ALL LAW ENFORCEMENT OFFICERS OF THE STATE OF SOUTH CAROLINA, APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

HENRY HAMMER,
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Greenville, S. C.,
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The R. L. Bryan Company, Legal Printers, Columbia, S. C.

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Supreme Court of the United States

OCTOBER TERM, 1948

No. ------

T. B. HOLLIDAY ET AL., APPELLANTS,

versus

GOVERNOR OF STATE OF SOUTH CAROLINA, ATTORNEY GENERAL OF STATE OF SOUTH CAROLINA, R. H. BEARDEN, SHERIFF OF GREENVILLE COUNTY, SOUTH CAROLINA, AND ALL LAW ENFORCEMENT OFFICERS OF THE STATE OF SOUTH CAROLINA, APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

STATEMENT

This matter is before the Court on motion of appellees to dismiss or affirm the appeal herein.

The appellants brought the instant suit in the United States District Court for the Western District of South Carolina to enjoin the enforcement of Section 1301 of the Code of Laws of South Carolina for 1942 as construed by

the South Carolina Supreme Court on the ground that such enforcement violates the rights of the appellants under the due process of law and equal protection of law clauses of the 14th Amendment to the United States Constitution. An interlocutory injunction was also sought and the case was therefore heard by three Judges under the provisions of Section 266 of the Judicial Code. On the hearing for the interlocutory injunction the case was submitted by counsel for final decree upon the merits. The application for interlocutory injunction as well as permanent injunction was denied and the complaint dismissed on the merits by the three Judge Court which held that the above statute of South Carolina was valid.

The appellants duly applied for and were allowed an appeal to the Supreme Court of the United States from the Rulings, Order and Decree of the specially constituted United States District Court for the Western District of South Carolina, and by virtue of Sections 238 and 266 of the Judicial Code as amended (28 U. S. C. A. Sections 345 and 380) this Court has jurisdiction of the instant appeal.

QUESTIONS INVOLVED

The appellees seek to dismiss or affirm under the provisions of Rules 7 and 12 of the Rules of the Supreme Court of the United States upon the ground that the questions on which the decision of the cause depend are so unsubstantial as not to require further argument. The instant appeal presents the following questions, which the appellants allege are substantial for a determination of the appeal herein.

(a) What is the purpose of Section 1301 of the Code of Laws of South Carolina for 1942?

(b) Does the legislative enactment as construed by the South Carolina Supreme Court under the above statute

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accomplish or tend to accomplish the purpose for which it was enacted?

(c) Does the above statute deprive the Appellants of their rights in violation of the due process of law clause of the 14th Amendment to the United States Constitution?

(d) Does the above statute deny to the Appellants the equal protection of the law in violation of the 14th Amendment to the United States Constitution?

ARGUMENT

Point A

The manifest purpose of the South Carolina Statute in question is to outlaw or suppress gambling devices per se.

It is a fundamental rule that in determining the constitutionality of a statute the courts will inquire into the purpose and object of the statute involved.

Section 1301 of the Code of Laws of South Carolina for 1942 declares it unlawful for any person, firm, or corporation to keep or operate on his, her, or its premises, any vending or slot machines, punch boards, pull boards, or other devices pertaining **to games of chance** of whatever name or kind, except automatic weighing, measuring, musical and vending machines which are so constructed as to give a certain uniform and fair return in value for each coin deposited therein, and in which there is no element of chance, and provides that this Section is also intended to prohibit all vending, slot machines, punch boards, pull boards, or other devices pertaining to **games of chance** that display different pictures, words, or symbols, at different plays, or different numbers, whether in words or figures, or which deposit tokens or coins at irregular intervals, or in varying numbers to the player or in the machine. (Emphasis added.)

The Supreme Court of South Carolina in the cases of *Alexander v. Hunnicutt*, 196 S. C. 364, *Alexander v. Martin*, 192 S. C. 176, and *Ingram v. Bearden*, 47 S. E. (2d) 833, has interpreted the aforesaid statute to include within the prohibition thereof coin operated non payout pin tables with or without free play feature as gambling devices *per se*.

Omitting for the present the consideration of the pin tables in question, a careful scrutiny of the statute makes it manifest that the purpose of the legislature in enacting such statute was to outlaw those devices which are in and of themselves gambling devices or gambling devices *per se*, and which obviously cannot be used for legitimate purposes without gambling. This conclusion is readily deducible from a consideration of the objects specifically named in the statute, which objects are obviously gambling devices *per se*. The conclusion that the purpose of the legislation was limited solely to the suppression or elimination of gambling devices *per se* and not to gambling in general is also supported by the language in the case of *Ingram v. Bearden, supra*, the most recent case dealing with the machines in question, wherein the Court said, "the type of Pin Table machine in question was declared to be a gambling device *per se* in the *Alexander case, supra*, and because of that fact was subject to confiscation under Section 1301-1 of the 1942 Code". (Emphasis added.) The conclusion that the statute was enacted solely for the purpose of eliminating gambling devices *per se* and not for the purpose of suppressing gambling in general also finds support in the fact that the legislature of South Carolina effectively dealt with the problems of gambling in general by virtue of the provisions of the gambling statute set forth in Sections 1738-1749 of the Code of Laws of South Carolina for 1942.

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For the above reasons we respectfully submit that the manifest purpose of the statute in question was solely to eliminate or suppress those devices which in and of themselves are gambling devices, or gambling devices *per se*, and which obviously cannot be used for legitimate purposes of entertainment or recreation without the presence of the element of gambling.

Point B

The legislative enactment in question as construed by the South Carolina Supreme Court bears no reasonable relation to the purpose for which it was enacted.

We have shown the manifest purpose for which the statute in question was enacted, and, taking the statute to mean what the highest court of the State says it means, *Guaranty Trust Co. v. Blodgett*, 287 U. S. 509, we now proceed to a consideration of the question as to whether or not the statute as construed bears a reasonable relation to the purpose for which it was enacted in order to reach a conclusion as to whether or not it is unconstitutional as being repugnant to the 14th Amendment of the United States Constitution.

We readily admit and concede that it is within the police power of the State to outlaw, suppress and eliminate gambling devices *per se*, and if the pin table machines in question are gambling devices *per se* we have no standing in this Court. We respectfully contend, however, that the pin table machines in question are not gambling devices *per se* and as such the inclusion of them within the prohibition of the legislative enactment bears no reasonable nor substantial relation to the object sought to be attained by the passage of the statute, to wit, the suppression or elimination of gambling devices *per se*.

It is a well established principle of law that when the constitutional protection is sought to be invoked it is the duty of the Courts to determine whether the challenged provision of a statute bears a reasonable relation to the object sought to be attained by the passage of such provision. *Burns Baking Company v. Bryan*, 264 U. S. 504; *Welch v. Swasey*, 214 U. S. 91; *Dobbins v. Los Angeles*, 195 U. S. 222; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540; *Mugler v. Kansas*, 123 U. S. 623; and the reasonableness or unreasonableness of a State enactment is always subject to review by the Federal Courts to determine whether or not such enactment is repugnant to the 14th Amendment of the United States Constitution. *Meyer v. Nebraska*, 262 U. S. 390; *Adams v. Tanner*, 244 U. S. 590.

Although there is diversity of opinion among the courts of the various states as to whether or not pin tables of the type in question are gambling devices *per se*, we respectfully submit that the weight of sound reasoning and good logic fortifies our contention that the machines in question are not gambling devices *per se*, *Chicago Patent Corporation v. Genco, Inc.* (CCA 8th) (1941) 124 Fed. (2d), 725; *Washington Coin Machine Association v. Callahan* (U. S. Circuit Court of Appeals D. C.) (1944) 142 Fed. (2d), 97; *Brafford v. Calhoun*, 72 Ohio. App. 920, 51 N. E. (2d), 920; *Gayle v. Whealan*, 59 Cal. App. (2d), 255, 138 P. (2d), 763; *Commonwealth v. Mihlow*, 142 Pa. Super, 433, 16 A. (2d) 656. The record in the instant case will disclose that the pin table machines in question are constructed and adapted for amusement and recreational purposes only; that the operation of them involves elements of skill and that there is no element of gambling in the playing of these machines as the term "gambling" is commonly understood by the average reasonably prudent person.

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We respectfully submit that the instant case squarely raises the issue as to whether or not the State of South Carolina, through the legislature and the courts arbitrarily treated the pin table machines in question as gambling devices *per se* and thus deprived the appellants of their rights under the 14th Amendment to the United States Constitution; and we urge that the question is most substantial and should be determined by this Court after a full and complete review of the statute, the purpose thereof, and an examination of the facts in order to make an independent determination as to whether or not the machines in question are of such nature so to be classified as gambling devices *per se*, *Truax v. Corrigan*, 257 U. S. 212; *Pollock v. Williams*, 322 U. S. 4, and in order to determine whether or not the inclusion of such machines in the statute bears a reasonable relation to the manifest purpose of the statute, to wit, outlawing of gambling devices *per se*.

The appellees rely on the case of *Murphy v. California*, 225 U. S. 623. In the *Murphy case* the Court, in sustaining the validity of a state statute prohibiting the keeping of billiard tables for hire or public use, stated, "The ordinance is not aimed at the game, but at the place." The instant case is clearly distinguishable for the reason that the statute in question aims directly at the game and not at the place, and if the game is inherently innocent and not a gambling device *per se*, the statute in question, by the inclusion of the pin table machines involved, cannot and does not have any reasonable relation to the object sought to be obtained by its passage. The Court also sustained the statute on the basis of judicial notice of facts which are entirely lacking and totally absent in the case at bar.

The appellees also rely on the case of *Durant v. Bennett*, 54 Fed. Rep. (2d) 634, which is clearly distinguishable from the instant case. The *Durant case* dealt with a slot

machine known as the "one-arm bandit" type and obviously could not be used for any other purpose than gambling. The type of machine in question was not before the Court. A perusal of the record makes it apparent that the pin table machines in question are entirely different and distinguishable from the slot machines involved in the *Durant case.*

Perhaps it might not be amiss to state at this time that the courts in the past have associated coin operated machines of every type with the old "one-arm bandit type" adapted and constructed for easy and fast gambling and for this reason have been prejudiced against them and most reluctant to treat the type of machine in question as being different from the old type of coin operated gambling devices. It is true, as stated by the courts, that the old type of slot machine adapted for easy and fast gambling has been changed in minor particulars in an attempt to bring them within the law and such changes were merely subterfuges and the machines were still adapted for easy and fast gambling and were consequently held to be gambling devices *per se.* The machines in the instant case, however, are not constructed and adapted for fast and easy gambling and have no resemblance in any manner, shape or form to the old coin operated gambling devices, the only similarity between the two types being that they are both operated by the insertion of a coin. On the contrary, with the advent of new developments, material changes and improvements upon the so-called pin table machines, the playing of these machines has become a game of skill, entertainment and amusement, and the philosophy of the courts in the treatment of the old type of coin operated machine is not suited to the present day machine, the condition and circumstances surrounding their operation. We know, from common experience, that unlike the old type of gambling device, the

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modern pin table machines are played by doctors, lawyers, judges, office workers, laborers, and others in all walks of life, for entertainment and purposes of diversion and relaxation from the monotonous routine of their work or profession, and that they are found in places of high repute, including church recreation halls, teen-age canteens, service clubs, and community recreation centers. The courts in recent years, in keeping with the philosophy suited to meet the changing conditions of the machines and the present day circumstances surrounding their operation, are beginning to recognize that the type of pin table machine in question is not in any material way connected with the old form of coin operated gambling devices and consequently have refused to follow the old line of decisions holding that such machines are gambling devices *per se*. The sound reasoning and logic of holding that the pin table machines in question are not gambling devices *per se* are clearly brought out in the opinions of the *Washington Coin case, supra,* and *Chicago Patent case, supra.* We respectfully submit that, after thoroughly analyzing and scrutinizing the operation and mechanics of the type of machine in question, in the light of the philosophy that the law is a progressive science and will adapt itself to new conditions as they arise, *Holden v. Hardy,* 169 U. S. 366; *Dobbins v. Los Angeles, supra,* and in the exercise of sound logic, the conclusion is inescapable that such machines are not gambling devices *per se,* and therefore, this court, in the performance of its judicial function affording the constitutional protection to all forms of lawful amusement, entertainment and recreation which are useful as part of our everyday life, should declare the legislative enactment in question, as construed by the Supreme Court of South Carolina, as arbitrary, unreasonable and having no relation to the object of suppressing gambling devices *per se.*

The other cases relied upon by appellees are decisions of the state courts which deal generally with the right of the states to eliminate those devices which tend to promote gambling, and do not deal with the elimination of gambling devices *per se*, which was the clear intention of the legislature in enacting the statute of South Carolina in question.

Point C

The Statute in question as construed by the South Carolina Supreme Court deprives the Appellants of their rights in violation of the due process of law clause of the 14th Amendment to the United States Constitution.

We respectfully submit that although the state under its police power has the right to suppress and outlaw gambling devices *per se*, yet if the statute in question does not accomplish that object because of the inclusion within the prohibition thereof of devices which are not gambling devices *per se*, such legislative enactment is repugnant to the due process of law clause of the 14th Amendment to the United States Constitution. *Burns Baking Company v. Bryan, supra.*

We have pointed out the manifest purpose of the statute and the fact that the inclusion of the pin table machines in question do not accomplish nor tend to accomplish such manifest purpose of the statute; and for these reasons we respectfully submit that the statute is unconstitutional in accordance with the decisions of this Court.

Conceding, for the purpose of argument, but not admitting, that the statute in question is not limited to the elimination only of gambling devices *per se*, but is broad enough to make its purpose the elimination of gambling in general, we still contend that the inclusion of the pin table machines in question within the prohibition of the statute

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does not even accomplish nor tend to accomplish the elimination of gambling in general. As heretofore pointed out, in accordance with the decisions enunciated by this Court, we respectfully submit that this Court should inquire into and review the reasonableness or unreasonableness of the state enactment in order to determine its constitutionality. Such review will indicate that the operation of the type of pin table machine in question involves the element of skill, arouses the competitive spirit, and is beneficial to individuals as a form of relaxation, entertainment and amusement. Relaxation, entertainment and amusement are playing an ever increasingly important rôle in our American life, and in accordance with such philosophy suited to present day conditions, we respectfully urge that the statute in question deprives the appellees of their fundamental rights under the due process of law clause of the 14th Amendment to the U. S. Constitution. The appellees urge that the statutory provisions should be upheld as an appropriate method of preventing gambling. That such evils exist in some degree in connection with the pin table machines is undoubtedly true "as it unfortunately is true in respect of the same or similar evils" in other kinds of amusements and entertainments such as golf, baseball, bowling, etc. But as this court stated in the case of *Tyson & Bro.-United Theatre Ticket Officers v. Banton*, 273 U. S. 418:

> "evils are to be suppressed or prevented by legislation which comports with the Constitution, and not by such as strikes down those essential rights of private property protected by that instrument against undue governmental interference. • • • It is not permissible to enact a law which, in effect, spreads an all-inclusive net for the feet of everybody upon the chance that, while the innocent will surely be entangled in its meshes, some wrongdoers also may be caught.

"What this court said in *Adams v. Tanner*, 244 U. S. 590, 594, 61 L. Ed. 1336, 1342, L. R. A. 1917-F, 1163, 37 Sup. Ct. Rep. 662, Ann. Cas. 1917-D, 973, in the course of its opinion holding invalid a statute of Washington penalizing the collection of fees for securing employment, is apposite:

" 'Because abuses may, and probably do, grow up in connection with this business, is adequate reason for hedging it about by proper regulations. But this is not enough to justify destruction of one's right to follow a distinctly useful calling in an upright way. Certainly there is no profession, possibly no business, which does not offer peculiar opportunities for reprehensible practices; and as to every one of them, no doubt, some can be found quite ready earnestly to maintain that its suppression would be in the public interest. Skillfully directed agitation might also bring about apparent condemnation of any one of them by the public. Happily for all, the fundamental guaranties of the Constitution cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked.' "

The tendency of what is generally or ordinarily or often done in operating the type of machines in question is not towards that which is admittedly immoral or pernicious. The machines in question are unlike billiard or pool tables for hire dealt with by this Court in the *Murphy v. California case, supra,* where two or more players usually participate in a single game for the purpose of gambling. In the operation of the type of machine before the court, the exercise of skill, amusement, recreation and fostering of the competitive spirit are the predominant elements. The element of gambling is the exception and is only incidental to the game just as it may be in the games of baseball, tennis, golf, and others, which are admittedly useful as part of our present everyday American way of life. The evil of gambling in general, which may be incidental to the operation

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of the machines in question, seems to have been effectively dealt with by the state in enacting the provisions of Sections 1738-1749, Code of Laws of South Carolina for 1942.

For the reasons aforementioned we respectfully submit that the instant case presents for the determination of this Court the serious question as to whether or not the statute assailed violates the due process clause of the 14th Amendment to the United States Constitution.

Point D

The South Carolina statute in question as construed by the Supreme Court of South Carolina denies to the Appellants the equal protection of the law.

Assuming that the statute in question as construed by the South Carolina Supreme Court was a valid exercise of police power we contend that it is unconstitutional in that it denies to the appellants the equal protection of the law because it permits the operation of coin operated weighing machines which have a free guess feature and prohibits the operation of the machines in question. The distinctions and classifications sought to be drawn by the statute in question are arbitrary, are not based on natural grounds of reasonableness or public policy, and do not tend to promote the public welfare. The statute in question in effect permits the operation of coin operated weighing machines with free guess feature and prohibits the operation of the machines in question without any reason for the distinction. It also appears that the legislature (Sec. 1738, Code of Laws of S. C., 1942) expressly permits the game of bowling which is very analogous and similar to the pin table game in question in that they both involve the use of skill and an equal amount of balls may or may not be used by the same or different players for each game played, and the player has no way of knowing his score in advance.

We therefore respectfully submit that under the law such statute is unconstitutional as being arbitrary and repugnant to the equal protection of law clause of the 14th Amendment to the United States Constitution. *Lake Shore & M. S. R. Co. v. Smith,* 173 U. S. 684, *Connolly v. Union Sewer Pipe Co., supra, Cotting v. Kansas City Stock Yards Co.,* 183 U. S. 79.

CONCLUSION

The instant appeal presents a serious question as to whether the inclusion of the pin table machines involved within the prohibition of the statute assailed accomplishes or tends to accomplish the manifest purpose of the statute. The substantial question, therefore, arises as to whether such statute contravanes the due process of law clause of the 14th Amendment to the United States Constitution. It also has been pointed out that such statute prohibits the operation of one type of game and permits the operation of similar types without any reason for the distinction, and therefore the substantial question as to whether this statute contravenes the equal protection of law clause to the 14th Amendment of the United States Constitution is presented for the determination of this Court.

For the reasons herein and in accordance with the law applicable to the facts in the instant case we respectfully submit that the constitutional questions raised by this appeal are substantial and the appellees' motion to dismiss or affirm should be overruled and denied.

Respectfully submitted,

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HENRY H. EDENS,
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Attorneys for Appellants.

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Supreme Court of the United States

OCTOBER TERM, 1948

No. 249

T. B. HOLLIDAY, APPELLANT,

versus

GOVERNOR OF STATE OF SOUTH CAROLINA, ATTORNEY GENERAL OF STATE OF SOUTH CAROLINA, R. H. BEARDEN, SHERIFF OF GREENVILLE COUNTY, SOUTH CAROLINA, AND ALL LAW ENFORCEMENT OFFICERS OF THE STATE OF SOUTH CAROLINA, APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA

MOTION TO DISMISS OR AFFIRM

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J. MONROE FULMER,
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Attorneys for Appellees, Governor State of South Carolina, Attorney General State of S. C. and all Law Enforcement Officers of State of South Carolina.

J. D. TODD, JR.,
Attorney for Appellee, Sheriff of Greenville County, South Carolina.

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Supreme Court of the United States

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No. ------

T. B. HOLLIDAY, APPELLANT,

versus

GOVERNOR OF STATE OF SOUTH CAROLINA, ATTORNEY GENERAL OF STATE OF SOUTH CAROLINA, R. H. BEARDEN, SHERIFF OF GREENVILLE COUNTY, SOUTH CAROLINA, AND ALL LAW ENFORCEMENT OFFICERS OF THE STATE OF SOUTH CAROLINA, APPELLEES.

MOTION TO DISMISS OR AFFIRM

Pursuant to the provisions of Rules 7 and 12 of the Supreme Court of the United States, the appellees move the Court to dismiss the appeal or in the alternative to affirm the judgment of the Court upon the following grounds:

1. That the questions on which the decision of the cause depends are so unsubstantial as not to require further argument because:

(a) The State of South Carolina has the power and authority to define its policy with reference to gambling or anything which might encourage gambling under its general police power.

(b) The appellant has failed to show that the statutes attacked are beyond the general police power of the State.

(c) The State of South Carolina has the right to dedeclare the machines in question to be gambling devices *per se.*

(d) The Supreme Court of South Carolina having declared that the machines in question are gambling devices *per se* under Section 1301 of the 1942 Code of Laws for South Carolina, and no appeal having been taken therefrom, the construction of the statute by the highest Court in the State is binding upon Federal Courts.

Respectfully submitted,

JOHN M. DANIEL,
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T. C. CALLISON,
Assistant Attorney General.

J. MONROE FULMER,
Assistant Attorney General.

Attorneys for Appellees, Governor State of South Carolina, Attorney General State of S. C. and all Law Enforcement Officers of State of South Carolina.

J. D. TODD, JR.,
Attorney for Appellee, Sheriff of Greenville County, South Carolina.

Supreme Court of the United States

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GOVERNOR OF STATE OF SOUTH CAROLINA, ATTORNEY GENERAL OF STATE OF SOUTH CAROLINA, R. H. BEARDEN, SHERIFF OF GREENVILLE COUNTY, SOUTH CAROLINA, AND ALL LAW ENFORCEMENT OFFICERS OF THE STATE OF SOUTH CAROLINA, APPELLEES.

BRIEF IN SUPPORT OF MOTION TO DISMISS OR AFFIRM

STATEMENT

Appellant, a North Carolina Corporation, sought an interlocutory and permanent injunction before a three-judge District Court convened pursuant to Section 266 of the Judicial Code against the enforcement by the appellees, South Carolina law enforcement officers, of certain "anti-gambling laws" of South Carolina. Appellant's contention is that the statutes in question (Sections 1301, 1301-1, Act No. 284 of the Acts of 1947 General Assembly of South Carolina) are unconstitutional in that they are in violation of

the appellant's rights as guaranteed by the 14th Amendment of the Constitution of the United States.

At the hearing before the three-judge Court a final decree was issued on July 20, 1948, dismissing the suit and denying the application for an injunction. However, the Order accompanying the decree enjoined the appellees from seizing and destroying the machines of the appellant pending appellant's appeal to the Supreme Court of the United States. The application of the appellant for a restraining order against the appellees interfering with the operation of the said machines pending the appeal to the Supreme Court was denied by the three-judge Court and the same application was also subsequently denied by the Chief Justice of the Supreme Court. The three-judge Court held that the South Carolina statutes were valid.

It is the appellees' position that appellant's constitutional questions are so unsubstantial as not to require argument. Authorities supporting these points are cited below.

The appellant's constitutional questions are without substance, having been settled by decisions of this Court.

South Carolina has the right without question under the general police powers of the State to define its public policy with reference to gambling or anything which may tend toward or encourage the same.

Murphy v. Cal., 225 U. S., 623, 32 S. Ct., 697;

Phillips v. City of Atlanta, 145 F. (2d), 470;

Calcutt v. McGeachy, 195 S. E. 49, 213 N. C. 1;

Eccles v. Stone, 183 Southern 628, 134 Fla. 113;

Woodward v. City of Lithonia, 11 S. E. (2d), 476, 191 Ga. 234;

Approximately Fifty-nine Gambling Devices v. People ex rel. Burke, 130 P. (2d), 920, 110 Colo. 82;

People v. One Pin Ball Machine, 44 N. E. (2d), 950, 316 Ill. App. 161;

Oatman v. Davidson, 16 N. W. (2d), 665, 310 Mich. 57;

People v. Bitter, 32 N. Y. Supp. (2d), 176.

The highest Court in the State of South Carolina has held the machines in question to be gambling devices *per se.*

Alexander v. Martin, Sheriff, 192 S. C. 176, 6 S. E. (2d) 20;

Alexander v. Hunnicutt, Sheriff, et al., 196 S. C. 364, 13 S. E. (2d), 630;

State v. Appley, 207 S. C., 284, 35 S. E. (2d), 835;

Ingram v. Bearden, Sheriff, 47 S. E. (2d), 833.

The statutes in question (Section 1301, 1301-1 of the Code of Laws for South Carolina) were held to be constitutional in 1931 by a three-judge statutory Court. *Durant v. Bennett, Sheriff, et al.,* 54 Fed. Rep. (2d), 634. Thus on two occasions a three-judge Court has held the statutes in question to be constitutional and not in violation of the 14th Amendment to the Constitution of the United States as appellant now contends.

CONCLUSION

It is submitted that the constitutional question raised by the appellant is unsubstantial.

Respectfully submitted,

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No. 249. HOLLIDAY ET AL. *v.* GOVERNOR OF SOUTH CAROLINA ET AL. Appeal from the United States District Court for the Western District of South Carolina. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *Henry Hammer* for appellants. *John M. Daniel*, Attorney General of South Carolina, *T. C. Callison* and *J. Monroe Fulmer*, Assistant Attorneys General, for appellees. Reported below: 78 F. Supp. 918.